

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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AJZN, INC. f/k/a AERIELLE,)	Civil Action
INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
DONALD YU, et al.,)	
)	
Defendants.)	No. 13-149-GMS

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Wilmington, Delaware
Friday, February 6, 2015
11:00 a.m.
Telephone Conference

- - -

BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.

APPEARANCES:

PILAR G. KRAMAN, ESQ.
Young Conaway Stargatt & Taylor, LLP
-and-
LAWRENCE J. HILTON, ESQ., and
KATHLEEN A. DONAHUE, ESQ.
O'Neil LLP
(Irvine, CA)

Counsel for Plaintiff

FRANCIS G.X. PILEGGI, ESQ., and
AIMEE M. CZACHOROWSKI, ESQ.
Eckert Seamans Cherin & Mellott, LLC
-and-
BENJAMIN G. STEWART, ESQ.
Keating Muething & Klekamp PLL
(Cincinnati, OH)

Counsel for Defendants

1 THE COURT: Good morning, counsel. Who is
2 appearing today for the plaintiff, please?

3 MS. KRAMAN: Good morning, Your Honor. This is
4 Pilar Kraman at Young Conaway. With me on the line is
5 Lawrence Hilton and Kathleen Donahue of O'Neil LLP.

6 THE COURT: Good morning.
7 For the various defendants? Do we have more
8 than one counsel? For instance, Donald Hu?

9 MR. PILEGGI: Good morning, Your Honor. This is
10 Francis Pileggi from Eckert Seamans. We represent all of
11 the defendants. My co-counsel, Aimee Czachorowski, is on
12 the phone, and my co-counsel Ben Stewart is also on the
13 phone as well.

14 THE COURT: Good morning to you all. I won't
15 keep you long. I will fill in the blanks that you left in
16 your proposed scheduling order which dates I find
17 acceptable.

18 And I am going to ask that plaintiff, or whoever
19 prepared this, get it filed by the 13th of the month, if you
20 would.

21 Here are your blanks. We are going to have a
22 pretrial conference beginning at 10:00 a.m. over here at the
23 courthouse on May 2, 2016.

24 Pretrial order will be due close of business,
25 6:00 p.m., April 18, 2016.

:01:10 1 Trial will commence 5/23/2016.

:01:16 2 Now, what I wanted to talk to you about is the
:01:20 3 form of trial. There seems to be a difference of view
:01:22 4 between the parties as to whether there is an entitlement to
:01:26 5 a jury. Has anybody demanded a jury in this case?

:01:34 6 MR. HILTON: Your Honor, Larry Hilton for the
:01:35 7 plaintiff.

:01:36 8 Yes, we did have a jury demand in our complaint.

:01:40 9 THE COURT: And, therefore, you believe that
:01:43 10 this should be a jury.

:01:44 11 Is there a different view on the other side?

:01:48 12 MR. STEWART: Your Honor, yes. This is Ben
:01:50 13 Stewart for the defendants.

:01:52 14 Just as a way of very brief background,
:01:54 15 originally, this case was filed in California, and was
:01:58 16 transferred to your Court pursuant to a forum selection
:02:01 17 clause. Our position is that in that agreement -- well, the
:02:04 18 fact is, in that agreement, there is also a waiver of a jury
:02:08 19 trial. And our position is that that clause is enforceable.
:02:14 20 So we would oppose the request for a jury trial.

:02:17 21 THE COURT: Why don't you want a jury trial,
:02:21 22 other than the clause?

:02:26 23 MR. STEWART: I would say my client's position
:02:30 24 is the cost, and it is what they bargained for. They think
:02:35 25 it's a more efficient means of resolving the dispute.

1 We are happy to brief that at whatever time is
2 most convenient for Your Honor, whether that be --

3 THE COURT: I doubt I am going to permit
4 briefing on this, counsel. With all due respect -- the
5 other side, why isn't he right, if there is a clause in the
6 relevant agreement where there has been a waiver, why
7 doesn't that apply here?

8 MR. HILTON: Your Honor, we don't believe that
9 the claims that survived the Court's ruling on the motion to
10 dismiss were included within the jury trial waiver, number
11 one. And number two, we question whether the jury trial
12 waiver was valid anyway.

13 But primarily, the claims that are going forward
14 are claims that arose after the agreement was entered into.
15 We don't believe that they are even covered. We did have a
16 contract claim based on the contract with the jury waiver.
17 And the Court granted the motion to dismiss on that. But
18 the claims that we have that have survived we don't believe
19 are within the scope of the jury waiver.

20 THE COURT: That's interesting.

21 What is the other side, what is your thought on
22 that? That seems to me to be pretty black and white. Yes?
23 No?

24 MR. STEWART: I mean, our position would be that
25 the same claims that were in the forum selection clause and

1 were transferred to your Court were related enough that they
2 were subject to the waiver as well.

3 THE COURT: That's sort of just a rather
4 conclusory statement. Why do you say that?

5 Let me ask this, with apologies. I am sure you
6 weren't prepared to exactly dig this deep into this issue.
7 But on the plaintiff's side, what claims are there that you
8 say that have survived, were not contemplated by the clause
9 in question?

10 MR. HILTON: Yes, Your Honor. The claims that
11 are remaining in the case are, number one, a breach of
12 fiduciary duty claim against Donald Hu. Donald Hu, number
13 one, is not a signatory to the agreement with the jury
14 waiver. Number two, the claim for breach of fiduciary duty
15 is based on Donald Hu's position as the CEO of the
16 plaintiff.

17 So we don't think that the plaintiff's waiver of
18 a jury trial for claims against the Great American Life
19 Insurance Company would even cover a claim that it has
20 against its own CEO for breach of fiduciary duty. That is
21 number one.

22 Number two, we have a claim that survives under
23 this what we have called an earnout agreement. The earnout
24 agreement didn't even exist until a year or more after the
25 transaction with the jury waiver.

1 This was a claim -- it's a right that arose long
2 after the jury waiver, and under a completely separate
3 agreement that does not have a jury waiver.

4 That is No. 2.

5 And the other claims that we have are basically
6 fraudulent transfer and successor-in-interest claims for
7 transfer of this intellectual property that occurred years
8 after the agreement was signed to have the jury waiver.

9 THE COURT: Okay. I am going to conditionally
10 schedule this as a jury trial, subject to the possibility of
11 later letter-style briefing. I won't permit full-blown
12 briefing on this issue. And if it is still a live issue,
13 you will report that in the proposed final pretrial order,
14 obviously, and I will likely, if I don't feel able to
15 resolve it simply on review of relevant case law, let you do
16 some letter briefing on the point.

17 But that's the way I will leave things stand at
18 this point. Okay?

19 (Counsel respond "Thank you.")

20 THE COURT: And I see you included a sentence
21 referring this matter to a Magistrate Judge. Let me just
22 take a look at this one paragraph, hold on, that I have
23 bracketed. Hold on, please, just a second.

24 (Pause.)

25 Let me ask this question. I am going to take us

off the record for a moment.

(Discussion off the record.)

THE COURT: We were just off the record talking about the prospects for settlement. The Court has offered to lend an assist if the parties believe it would be helpful relative to third-party agreements to institute an order or execute an order directing defendant to turn over the information that plaintiff and defendant agree would be critical to the amicable resolution of the problem.

It just seems kind of obvious that that should be done. I look forward to that happening ASAP, counsel.

Okay?

(Counsel respond "Thank you.")

THE COURT: Anything else?

MR. HILTON: Not from the plaintiff's side, Your Honor.

MR. STEWART: Nothing from the defendants, Your Honor.

THE COURT: Have a good weekend, counsel.

(Conference concluded at 11:15 a.m.)

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Reporter: Kevin Maurer